No. 86-353

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JOSEPH F. SPANIOL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF THE PETITION

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November 27, 1986

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RESPONDENTS' BRIEF IN SUPPORT OF THE PETITION

At issue in this case is whether a rail carrier can enlist the aid of federal courts to break a lawful railway labor strike by enjoining a form of economic self-help plainly permitted under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* Faced with the prospect of peaceful secondary picketing by Respondents Brotherhood of Maintenance of Way Employes, *et al.* ("BMWE"),[1] Petitioner

[1] In addition to BMWE, Petitioner named the following international BMWE officers as defendants below: O.M. Berge, President, W.E. LaRue, Vice-President, J. Dodd, General Chairman, J. Cassese, General Chairman, and P.W. MacQueen, Assistant General Chairman.

Consolidated Rail Corporation ("Conrail") immediately obtained a preliminary injunction prohibiting BMWE from engaging in any secondary conduct directed at Conrail. On appeal, the United States Court of Appeals for the Second Circuit vacated the injunction, holding that the RLA does not prohibit or regulate secondary picketing once the primary parties to an RLA dispute can lawfully engage in self-help and that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, thus deprived the district court of jurisdiction to enjoin BMWE's intended secondary picketing in this case. Over the past several months, four other circuits have considered and uniformly rejected similar carrier attempts to enjoin BMWE's actual or intended secondary picketing in this labor dispute.[2] Every circuit involved in the BMWE litigation has agreed that Congress has not acted to regulate secondary picketing in the railway industry and that the federal courts cannot do so in defiance of the plain language of the Norris-LaGuardia Act. Accordingly, Respondent BMWE respectfully requests that this Court grant the instant Petition and affirm the judgment of the court of appeals.

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[2] *See Brotherhood of Maintenance of Way Employes* v. *Guilford Transp. Indus.*, No. 86-1366 (1st Cir. Oct. 28, 1986) (reproduced in the Appendix hereto at A1-A16); *Norfolk & W. R.R.* v. *Brotherhood of Maintenance of Way Employes*, 795 F.2d 1169 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3115 (U.S. Aug. 1, 1986) (No. 86-175); *Richmond, F. & P. R.R.* v. *Brotherhood of Maintenance of Way Employes*, 795 F.2d 1161 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3259 (U.S. Sept. 26, 1986) (No. 86-503); *Central Vermont Ry.* v. *Brotherhood of Maintenance of Way Employes*, 793 F.2d 1298 (D.C. Cir. 1986); *Burlington Northern, Inc.* v. *Brotherhood of Maintenance of Way Employes*, 793 F.2d 795 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 60 (1986) (No. 86-39).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 792 F.2d 303. The bench opinion of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The court of appeals announced its judgment on June 5, 1986. (Pet. App. A1). No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of certain provisions of the RLA, 45 U.S.C. §§ 152, First and Second, 155, First, 156 and 160, and certain provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104 and 113. These and other pertinent statutory provisions are reprinted as Appendix C to the Petition. (Pet. App. C1-C28).

STATEMENT OF THE CASE

Respondents adopt the court of appeals' recitation of the factual circumstances surrounding this case. (Pet. App. A2-A3). The labor dispute underlying Conrail's Petition began in April of 1984 when BMWE notified the Maine Central Railway ("MEC") and the Portland Terminal Company ("PT") in accordance with Section 6 of the RLA, 45 U.S.C. § 156, that it sought to negotiate various changes in the existing rates of pay, rules and working conditions governing MEC and PT maintenance of way workers. The MEC and PT are wholly owned subsidiaries of Guilford Transportation Industries ("GTI"). Over the next two

years, BMWE and the MEC-PT fully exhausted the RLA's "major dispute" collective bargaining process, *see* 45 U.S.C. §§ 152, 155-156,[3] without securing agreement on a new labor contract. Once the parties were free to engage in economic self-help under the RLA in March of 1986, BMWE commenced a lawful strike against MEC and PT; in response, the MEC and PT locked out their maintenance of way workers.

To enhance the bargaining position of the MEC and PT strikers, BMWE sought to picket certain secondary rail carriers that, in BMWE's view, provided direct or indirect assistance to the GTI system. (*Id.* at A3). As part of this plan, BMWE notified Conrail by telegram on April 3, 1986, that it intended to engage in peaceful secondary picketing at various Conrail facilities (*id.*) "in order to resolve

[3] To initiate major dispute collective bargaining under the RLA, a party seeking to change rates of pay, rules or working conditions must tender advance written notice under Section 6 of the Act, 45 U.S.C. § 156. The parties must then negotiate over the proposed changes, *id.* § 152, Second, and if conferences fail to resolve the dispute, either party may invoke the mediation services of the National Mediation Board ("NMB"), *id.* § 155, First. If mediation fails, the NMB proffers binding arbitration to the parties, which can occur only if both consent. *Id.* §§ 155, First, 157. An unsuccessful proffer of arbitration releases the parties from mediation and triggers the Act's 30-day "cooling off" period, *id.* § 155, First, after which either party can engage in peaceful economic self-help. *See Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-80 (1969). While the parties exhaust these dispute resolution procedures, neither may unilaterally alter the status quo working conditions involved in the dispute. *See id.*; 45 U.S.C. §§ 152, First, Seventh, 155, First, 156. Congress deliberately designed this major dispute collective bargaining framework as "an almost interminable process." *Detroit & T.S.L.R.R.* v. *United Transp. Union*, 396 U.S. 142, 149 (1969) ("*Shore Line*").

[BMWE's] dispute with the Maine Central Railroad." [4] Conrail promptly obtained a preliminary injunction prohibiting BMWE from engaging in any secondary pressure directed at the carrier. While the district court acknowledged that no RLA provision "expressly" limits secondary picketing in the railway industry (Pet. App. B3), it nonetheless concluded that BMWE could not picket Conrail until it exhausted the RLA's lengthy major dispute bargaining process with *Conrail*, the secondary employer. (*Id.* at B3-B4). The district court further reasoned that the jurisdictional limitations of the Norris-LaGuardia Act were generally inapplicable to railway labor disputes in light of Congress' general intent to avoid the disruption of transportation and to provide for the orderly settlement of disputes under the RLA, *see* 45 U.S.C. § 151a. (*Id.* at B2).

The district court thus concluded what no other court in the 60-year history of the RLA had ever found until this labor dispute, namely that the RLA prohibits a railway union from engaging in peaceful secondary picketing once the union has exhausted major dispute collective bargaining with the primary employer. In vacating the district

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[4] BMWE's threatened secondary conduct on behalf of the MEC and PT strikers thus did not concern any dispute over the rates of pay, rules and working conditions of *Conrail's* employees, some of whom also happen to be represented by a distinct BMWE local group. Accordingly, the record does not support Conrail's assertion (Pet. 13-14) that BMWE's conduct in this dispute constituted *primary* pressure directed at Conrail in violation of the RLA obligations that Conrail's employees owe to Conrail. *See Central Vermont*, 793 F.2d at 1302 n.10 (specifically rejecting this argument under virtually identical factual circumstances). Moreover, nothing in the record or the findings of either court in this case indicates that any BMWE-represented Conrail employees "engaged in their own work stoppage" (Pet. 6) or "attempt[ed] to change working conditions on Conrail" (*id.* at 13). Instead, as the district court (Pet. App. B4) and the court of appeals (*id.* at A3-A5) recognized, this case concerns a classic instance of secondary pressure. *See generally National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 621-26 (1967).

court's injunction, the Second Circuit simply followed this Court's holding that the RLA, unlike the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4), does not purport to regulate or limit secondary conduct during the self-help period. *See Jacksonville Terminal,* 394 U.S. at 386-93. The Second Circuit further concluded that nothing in the language, history or overall structure of the RLA indicates that Congress intended railway unions to exhaust the RLA's lengthy bargaining process with each and every *secondary* employer it seeks to picket. (Pet. App. A4-A5). Accordingly, the Second Circuit held that neither Conrail's "secondary mediation" theory nor the RLA's overall policy aims could override the anti-injunction mandate of the Norris-LaGuardia Act. *See Chicago & N.W. Ry.* v. *United Transp. Union,* 402 U.S. 570, 583-84 (1971) (*"Chicago & North Western"*). Any contrary result, the court concluded, would countenance precisely the type of freewheeling judicial interference into labor relations that the Norris-LaGuardia Act was enacted to prevent. (*Id.* at A4).

On May 15, 1986, immediately after oral argument on the merits of BMWE's appeal, the Second Circuit stayed the district court's injunction, and BMWE commenced peaceful secondary picketing at various Conrail facilities. On May 16, 1986, President Reagan appointed a Presidential Emergency Board pursuant to Section 10 of the RLA, 45 U.S.C. § 160, to investigate and report on BMWE's underlying labor dispute with the MEC and PT. *See* Exec. Order No. 12,557, 51 Fed. Reg. 18,429 (1986). The appointment of an Emergency Board triggered a 60-day cooling off period and required the parties to restore and to maintain the pre-strike status quo working conditions. *See* 45 U.S.C. § 160; *Shore Line,* 396 U.S. at 150-53. The Emergency Board duly reported to the President its

recommendations for the settlement of the underlying BMWE/MEC-PT dispute. When the Section 10 cooling off period expired on July 21, 1986, however, the MEC and PT declined to adopt the recommendations of the Emergency Board and unilaterally imposed substantial cuts in the rates of pay, rules and working conditions of its maintenance of way workers. Rather than resuming its strike, Respondent BMWE instructed its members to continue working while the union sought to negotiate a settlement.

On August 12, 1986, Congress intervened in this dispute to extend the status quo that existed on July 20, 1986 for an additional 60 days until September 18, 1986. *See* H.J. Res. 683, 99th Cong., 2d Sess., 132 Cong. Rec. H5998-99 (daily ed. Aug. 12, 1986). BMWE and the primary carriers again failed to resolve their dispute during this additional cooling off period. Finally, on September 30, 1986, Congress enacted legislation that imposes the Emergency Board's recommendations as the rates of pay, rules and working conditions for the MEC and PT maintenance of way workers. *See* Pub.L.No. 99-431, — Stat. — (1986) (reproduced as Appendix A to Petitioner's Supplemental and Reply Memorandum).[5]

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[5] Public Law No. 99-431 effectively settles the underlying primary dispute between BMWE and the MEC-PT by enacting the recommendations of the Emergency Board as if they were negotiated by the parties under the RLA. (Petitioner's Supplemental and Reply Memorandum at A2-A3). As a result, Conrail no longer faces the threat of future secondary pressure arising out of this particular labor dispute. Conrail has further stipulated to dismiss its damages claim in this case in return for BMWE's agreement to support the instant Petition and to waive any recovery on the injunction bond issued by the district court. Respondents submit that these events have not rendered this case moot, however, since the underlying labor dispute is "capable of repetition, yet evading review." *See Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 125-27 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973).

ARGUMENT

Petitioner contends that the Norris-LaGuardia Act, despite its sweeping language, does not withdraw federal jurisdiction to enjoin secondary picketing (Pet. 9-12) and that the RLA either prohibits or strictly regulates secondary conduct in the railway industry (*id.* at 12-16). Neither of these propositions can claim any support in the relevant statutory language or the decisions of this Court; accordingly, the five circuits involved in the BMWE litigation have unanimously concluded that Congress has permitted railway labor unions to engage in peaceful secondary picketing, without fear of federal court injunctions, during the RLA's self-help period. Because this nationwide litigation has raised important issues of federal railway labor policy, this Court should now grant the Petition, coordinate this case with *Burlington Northern,* and affirm the decision of the Second Circuit.

1. Congress enacted the Norris-LaGuardia Act to "tak[e] the federal courts out of the labor injunction business." *Marine Cooks & Stewards* v. *Panama S.S. Co.,* 362 U.S. 365, 369 (1960). The Act thus withdraws federal jurisdiction to issue injunctive relief in any case "involving or growing out of a labor dispute," 29 U.S.C. §§ 101, 104, and it explicitly extends this jurisdictional bar to any union conduct "[g]iving publicity to the existence of . . . any labor dispute, whether by advertising, speaking, *patrolling,* or by any other method not involving fraud or violence." *Id.* § 104(e) (emphasis added). Congress further defined the "labor disputes" covered by the Act to include *"any* controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." *Id.* § 113 (emphasis added). Congress specifically intended the federal courts to interpret these provisions broadly and literally. *See Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n,* 457 U.S. 702, 711-12

(1982) (*"Bulk Terminals"*); S. Rep. No. 163, 72d Cong., 1st Sess. 25 (1932).

Despite the clear applicability of these provisions to secondary picketing, Conrail maintains that secondary pressure does not "involve or grow out of a labor dispute" whenever a federal judge determines that the union's conduct does not further its legitimate "economic self-interest." (Pet. 10-11). Neither the plain language of the statute, *see* 29 U.S.C. § 113, nor its thoroughly-documented history, *see, e.g., Bulk Terminals,* 457 U.S. at 711-20, provides even the slightest support for this ill-defined and judge-made limitation on the Norris-LaGuardia Act. Accordingly, at least six circuits—including every circuit involved in the BMWE litigation—have emphatically rejected any exception to the Norris-LaGuardia Act based on judicial second-guessing of employee "self-interest." [6]

Given the uniform rejection of this economic self-interest analysis throughout the BMWE litigation, Conrail cannot plausibly maintain (Pet. 9-12) that the earlier decisions of the Fifth Circuit, *see Brotherhood of R.R. Trainmen* v. *Atlantic Coast Line R.R.,* 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court,* 385 U.S. 20 (1966), and the Eighth Circuit, *see Ashley, D. & N. Ry.* v. *United Transp. Union,* 625 F.2d 1357 (8th Cir. 1980) (*"Ashley, Drew"*), retain vitality. The Fifth Circuit, for example, did not adopt the restrictive construction of the Act that Conrail advances before this Court. Instead, the Fifth Circuit concluded that secondary picketing fell within the literal and common sense reach of the Norris-LaGuardia Act, *see Atlantic Coast*

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[6] The First, Second, Fourth, Seventh and District of Columbia Circuits rejected this argument in cases growing out of BMWE's dispute with the MEC and PT. *See supra* note 2. The Ninth Circuit had earlier rejected any economic self-interest exception to the Norris-LaGuardia Act in a non-railroad case. *See Smith's Management Corp.* v. *International Bhd. of Elec. Workers,* 737 F.2d 788, 790-92 (9th Cir. 1984).

Line, 362 F.2d at 653-54, and that it also satisfied any conceivable limitation on "labor disputes" subject to the Act because secondary picketing is obviously related to the legitimate collective bargaining interests of both the primary and secondary employees, *see id.* at 654-55. While the Eighth Circuit later misconstrued this reasoning to render the Norris-LaGuardia Act inapplicable to secondary picketing unless the interests of the primary and secondary *employer* are "substantially aligned," *see Ashley, Drew*, 625 F.2d at 1362-67, that rationale is now thoroughly repudiated [7] and no longer creates any genuine conflict among the circuits.

In any event, the supposed conflict created by *Atlantic Coast Line* and *Ashley, Drew* is plainly foreclosed by this Court's consistent interpretation of the Norris-LaGuardia Act. As the Court has often explained, Congress deliberately adopted the broadest possible definition of the "labor disputes" protected by the Act precisely to prevent a labor jurisprudence dominated by judicial inquiry into the legitimacy of union objectives. *See, e.g., Bulk Terminals*, 457 U.S. at 711-20; *Marine Cooks*, 362 U.S. at 369.

> Congress made the definition [of a "labor dispute"] broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted.

Order of R.R. Telegraphers v. *Chicago & N.W. Ry.*, 362 U.S. 330, 336 (1960). For this very reason, the Court in *Bulk Terminals* squarely held that the Norris-LaGuardia Act prohibits judicial assessment of union objectives and

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[7] *See, e.g., Richmond*, 795 F.2d at 1166-67; *Central Vermont*, 793 F.2d at 1299-1301; *Burlington Northern*, 793 F.2d at 805-07; *Smith's Management*, 737 F.2d at 790-92.

explicitly rejected any judge-made "economic self-interest" limitation on the Act's coverage. *See Bulk Terminals,* 452 U.S. at 713-15.[8] Here, too, Conrail's construction of the Norris-LaGuardia Act would impermissibly "embroil federal judges in the very scrutiny of 'legitimate objectives' that Congress intended to prevent when it passed the Act." *Id.* at 719.

2. The clear applicability of the Norris-LaGuardia Act to this dispute is fatal to Conrail's attempt to enjoin BMWE's secondary picketing. While the Court has recognized the need to accommodate the Norris-LaGuardia Act to permit injunctive enforcement of explicit, positive RLA commands (Pet. 12-13),[9] the RLA contains no provision that even remotely prohibits or limits secondary conduct once the parties are free to engage in self-help. To the contrary, the RLA plainly permits railway unions "to employ the full range of whatever peaceful economic power they can muster" once the parties have exhausted the RLA's lengthy major dispute bargaining procedure. *Jacksonville Terminal,* 394 U.S. at 392. Congress sanctioned this wide-

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[8] *Bulk Terminals* also clearly rejected any "economic self-interest" exception to the Norris-LaGuardia Act "in cases where the disputants do not stand in the relationship of employer and employee." *Bulk Terminals,* 457 U.S. at 714 (citing *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U.S. 552 (1938)).

[9] In particular, the Court has recognized federal jurisdiction to enjoin RLA strikes over arbitrable minor disputes, *see Brotherhood of R.R. Trainmen* v. *Chicago River & I.R.R.,* 353 U.S. 30, 39-42 (1957), and to enjoin either party from violating a central, express RLA provision, *see Virginian Ry.* v. *System Fed'n No. 40,* 300 U.S. 515, 562-63 (1937). However, the Court has expressly limited this accommodation principle to "narrowly defined situations" involving specific RLA obligations. *Bulk Terminals,* 457 U.S. at 720. The Court has likewise cautioned against judicial use of vague RLA policies as "a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place." *Chicago & North Western,* 402 U.S. at 583 (footnote omitted).

ranging use of economic self-help despite the general dispute-resolution aims of the RLA and despite the general responsibilities of rail carriers to provide transportation services. *See id.* at 377-78; *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 244-45 (1966).

When Congress amended the NLRA in 1947 to prohibit certain forms of secondary conduct by non-railway unions,[10] moreover, it specifically considered and rejected proposals to ban secondary picketing under the RLA as well. *See Jacksonville Terminal,* 394 U.S. at 376 n.10 (quoting 93 Cong. Rec. 6498 (1947) (statement of Sen. Taft)). In *Jacksonville Terminal,* the Court thus concluded that the states could not prohibit or regulate secondary picketing in the railway industry because Congress has chosen to protect such conduct under the RLA. *Id.* at 392-93. As the Court explained:

> Thus, if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, . . . it might well decide . . . that this field requires extraordinary treatment of some sort. Certainly, it is for the Congress, and not the courts, to strike the balance "between the uncontrolled power of management and labor to further their respective interests." The Congress has not yet done so.

Id. at 392 (citations omitted) (quoting *Local 1976, United Bhd. of Carpenters* v. *NLRB,* 357 U.S. 93, 100 (1958)).

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[10] *See* Labor-Management Relations (Taft-Hartley) Act, ch. 120, § 101, 61 Stat. 136, 140-41 (1947) (codified as amended at 29 U.S.C. § 158(b)(4)). The Taft-Hartley Act empowers only the National Labor Relations Board, not private employers, to petition federal courts for injunctive relief against the prohibited forms of secondary conduct. *See* 29 U.S.C. §§ 160(j)-(l); *Bulk Terminals,* 457 U.S. at 718-19.

Accordingly, no federal appellate court has ever concluded that the RLA restricts secondary picketing during the self-help period.[11]

Conrail nonetheless contends that the RLA does prohibit secondary picketing in the self help period unless and until the union exhausts NMB mediation with the relevant *secondary* carrier (Pet. 13) under the RLA's "miscellaneous" mediation provision. *See* 45 U.S.C. § 155, First (b). The RLA itself, however, plainly limits any such bargaining obligation to "carriers and the employees *thereof*," *id.* § 152, First (emphasis added),[12] and Conrail cannot point to any support in the RLA's legislative history or overall structure for this unprecedented and unworkable "secondary mediation" theory. The suggestion that federal courts should construe the overall dispute-resolution aims of the RLA to prohibit secondary picketing (Amicus Br. 7-9) is equally devoid of any statutory or historical basis. Congress specifically enacted Section 10 of the RLA—which provides for the creation of an Emergency Board and the suspension of self-help—as the exclusive RLA remedy for railway labor disputes that threaten to disrupt

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[11] In *Ashley, Drew,* the Eighth Circuit relied on the general policy provisions of the Interstate Commerce Act, 49 U.S.C. § 11101(a), to enjoin secondary picketing by a railway union. *See Ashley, Drew,* 625 F.2d at 1369-71. This Court has clearly held, however, that "unlawfulness under *nonlabor* legislation [does] not remove the restrictions of the Norris-LaGuardia Act upon the jurisdiction of the federal courts." *Telegraphers,* 362 U.S. at 339 n.15 (emphasis added; citations omitted). Accordingly, Conrail's repeated invocation of the Interstate Commerce Act (Pet. 2, 10 n.7, 14) is irrelevant to the jurisdiction of federal courts to enjoin secondary picketing in the railway industry.

[12] Indeed, the RLA's central procedures and obligations are all specifically designed to regulate the relationship between a carrier and *its* employees. *See, e.g.,* 45 U.S.C. § 152, Second (direct negotiations); *id.* § 157 (arbitration); id. § 160 (Emergency Board procedures).

essential transportation services. *See* 45 U.S.C. § 160; *Shore Line*, 396 U.S. at 150-53. The RLA does not permit federal courts to impose *additional* non-statutory limits on union self-help whenever a federal judge determines that such relief would further national transportation interests.

At bottom, Conrail's entire position in this case reflects nothing more than Petitioner's incredulity that Congress has chosen to prohibit secondary picketing under the NLRA, but not under RLA. (Pet. 15-16). Congress has done precisely that, however, and Conrail cannot ask the federal courts to overturn that congressional choice by ignoring the plain language of both the RLA and the Norris-LaGuardia Act.

CONCLUSION

For these reasons, the Court should grant the Petition and affirm the decision of the court of appeals.

Respectfully submitted,

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November 27, 1986

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1366

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

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v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL.,

Defendants, Appellees.

DELAWARE AND HUDSON RAILWAY COMPANY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

Before: Campbell, *Chief Judge,*
Bownes and Torruella, *Circuit Judges.*

October 28, 1986

TORRUELLA, *Circuit Judge.* The principal issue presented by this appeal is whether the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA), overrides the provisions of the Norris-

LaGuardia Act, 21 U.S.C. § 101 *et seq.*, to the extent of permitting the enjoining of secondary picketing by a labor organization that has exhausted the procedures established by the RLA for resolution of a "major" dispute [1] with a primary carrier-employer.[2] Although this is a question of first impression in this circuit, we are the fortunate beneficiaries of prior consideration of this query by several of the courts of appeal. *See Burlington Northern R. Co.* v. *B.M.W.E.*, 793 F.2d 795 (7th Cir. 1986) (cannot enjoin secondary boycott); *Central Vermont Ry.* v. *Broth. of Maintenance*, 793 F.2d 1298 (D.C. Cir. 1986) (cannot enjoin secondary picketing); *Richmond, Fredericksburg and Potomac R.R. Co.* v. *B.M.W.E.*, No. 3544 (4th Cir., July 11, 1986) (same). *But see, Ashley, Drew and Northern Ry.* v. *UTU*, 625 F.2d 1357 (8th Cir. 1980) (secondary picketing may be enjoined when the interests of the party being picketed are not "substantially aligned" with those of the struck employer); *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966) (same). *Cf. Consolidated Rail Corp.* v. *Broth. of Maintenance*, 792 F.2d 303 (2d ir. 1986) (no need to exhaust RLA remedies before picketing secondary employer).

We affirm, on jurisdictional grounds, the district court's refusal to enjoin such conduct. 29 U.S.C. § 101.

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[1] In RLA parlance a "major" dispute arises from the formation or negotiation of changes to agreements regarding rates of pay, rules, or working conditions. *See Elgin, J. & E. Ry.* v. *Burtey*, 325 U.S. 711, 722-28 (1945); 45 U.S.C. §§ 155-160. A "minor" dispute is concerned with the resolution of grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), 45 U.S.C. § 153.

[2] We are not deciding whether secondary activity is enjoinable prior to exhaustion of RLA dispute resolution procedures with the primary carrier employer.

Appendix

I

The appellee in this case, the Brotherhood of Maintenance of Way Employees (BMWE), is a labor organization representing a bargaining unit of maintenance of way employees of the Maine Central Railroad and its wholly-owned subsidiary, the Portland Terminal Company (referred collectively hereafter as the Maine Central). Since April, 1984, BMWE and Maine Central have been engaged in the negotiation of changes to their collective bargaining agreement, but have reached no agreement. The parties exhausted the RLA procedures for "major" dispute resolution [3] and thereafter, on March 3, 1986, the BMWE commenced a strike against the primary carrier-employer, Maine Central. Maine Central attempted to continue operating with supervisory personnel and replacements,[4] which in turn led to the escalation of hostilities by the BMWE. The union extended its picketing to other carriers not directly involved in the dispute with Maine Central. The object of this secondary picketing was to indirectly pressure Maine Central to give in to the BMWE's bargaining demands.

The pickets were initially extended to the Boston & Maine Railroad (B & M), which, like the Maine Central, is owned by Guilford Transportation Industries, Inc. (Guilford), a holding company. B & M interconnects with the Maine Central. Thereafter BMWE also picketed Delaware and Hudson Railway Company (D & H), another Guilford

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[3] 45 U.S.C. §§ 155-160. *See Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

[4] *See Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238 (1966).

subsidiary, which however is non-connecting.[5] Additional non-affiliated and non-connecting railroads were picketed by BMWE, also with the object of exerting pressure on Maine Central.

Various suits were commenced throughout the country by the several secondary carriers in an attempt to stop the BMWE's secondary picketing. All of these suits, despite some initial successes in the district courts, were ultimately unsuccessful. The courts of appeal held that the secondary picketing was not prohibited by the RLA and could not be enjoined because of the Norris-LaGuardia Act. *See Burlington Northern R. Co., supra; Central Vermont Ry., supra; Richmond, Fredericksburg and Potomac R.R. Co., supra.*

In the meantime, in an apparent attempt to forestall action by the carriers elsewhere, the BMWE filed a declaratory judgment suit in the U.S. District Court in Maine against Guilford, B & M, and D & H, seeking, among other things, a declaration to the effect that its secondary picketing of B & M and D & H was protected activity under the Constitution and the RLA. The carrier-defendants counter claimed and sought injunctive relief to prohibit the secondary activity.

The district court, after hearing D & H's motion for preliminary injunction, ruled that all that was required for the Norris-LaGuardia Act to apply was that there be a labor dispute and that the union continue to act as a labor organization. Finding that both conditions existed

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[5] Appellee Guilford in its brief raises questions regarding the right to picket these affiliates because of its dispute with Maine Central. We need not enter this quagmire as the district court's decision is not based on the corporate affiliation of appellants to Maine Central, but rather assumes *arguendo* its immateriality. We shall do likewise.

in this case, the court in effect concluded that it was immaterial whether or not the interests of D & H and Maine Central were "substantially aligned." [6] Injunctive relief was denied and this appeal ensued.

II

In 1881 Oliver Wendell Holmes, in his now famous essay, stated that "[t]he life of the law has not been logic; it has been experience." [7] The present situation is a case in point, as much of appellant's argument is based on its perception that it would be illogical to conclude that Congress, in enacting the legislation here in question, intended to permit a relatively small labor dispute in Maine to disrupt railroad transportation activities in other parts of the nation. What Congress may or may not have done is explainable less in terms of logic, than by recounting how this legislation developed. Thus, the issue presented by this case cannot be answered, and the answer cannot be properly supported, without consideration of the events leading up to the passage of the RLA, and subsequent legislation.[8]

At common law, all strikes and pickets, whether primary or secondary, were considered illegal combinations or conspiracies. In the early 18th century most of this activity was subjected to criminal sanctions,[9] an attitude that pre-

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[6] *See Ashley, Drew and Northern Ry., supra; Brotherhood of Railroad Trainmen, supra.*

[7] Holmes, *The Common Law*, p. 1 (Howe, ed., 1963).

[8] *See generally* Cox, Bok and Gorman, *Labor Law*, 9th ed. (1981); Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958); Gregory, *Labor and the Law*, 2d ed. (1958); Frankfurter & Greene, *The Labor Injunction* (1930).

[9] *See, e.g., Commonwealth* v. *Pullis*, Philadelphia Mayor's Ct., 1806.

vailed until *Commonwealth* v. *Hunt* [10] ruled that collective labor activity was not a criminal conspiracy. Thereafter, the civil injunction became the principal weapon by which strikes and picketing were suppressed. In issuing injunctive relief against these concerted activities, courts relied on common law principles of nuisance, trespass and interference with advantageous relationships.[11]

Two views soon emerged, both of which were represented in the leading Massachusetts case of *Vegelahn* v. *Gunter*.[12] In this case the majority held that peaceful picketing to obtain higher wages was an unlawful means of securing a lawful objective. Judge Holmes dissented, arguing that if the object of the activity was lawful, any non-violent means was lawful, even against "third persons." In this stage of development of the law of striking and picketing, no distinction appears to have been drawn between primary and secondary activity.[13]

In 1908, the Supreme Court decided the *Danbury Hatters* case,[14] specifically ruling that both primary and secondary boycotts were actionable in damages pursuant to Section 7 of the Sherman Act.[15] Thereafter the use of the federal courts to enjoin labor disputes became even more prevalent and led to the passage of the Clayton Act in 1914.[16]

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[10] 45 Mass. (4 Met.) 111 (1842).

[11] *See In re Debs*, 158 U.S. 564 (1895).

[12] 167 Mass. 92 (1896).

[13] *See Plant* v. *Woods*, 176 Mass. 492 (1900), (Holmes, J. dissenting).

[14] *Loewe* v. *Lawlor*, 208 U.S. 274 (1908).

[15] July 2, 1890, c. 647, 26 Stat. 209.

[16] 15 U.S.C. §§ 12 *et seq.*

Appendix

In enacting Section 20 of the Clayton Act,[17] Congress attempted to narrow the jurisdiction of the federal courts by prohibiting injunctions in disputes concerning terms and conditions of employment. Purportedly, the only exception was equitable relief necessary to prevent irreparable injury to property or to a property right. The Supreme Court, however, in *Duplex Printing Press Co.* v. *Deering*,[18] narrowed Section 20's prohibition on injunctions to disputes between parties in the proximate relation of employer and employee and not to secondary boycotts. Thus secondary activity was held to be enjoinable even after Section 20 was enacted.

Against this background Congress passed the RLA in 1926.[19] Although limited at that time to the railroad industry,[20] the RLA was the first major Congressional recognition of employees' right to organize and to negotiate with employers. The RLA made no mention of secondary boycotts. There are, however, various indications from the text of the statute that the rights and procedures established thereunder were only intended to regulate the relationships between carriers and *their* employees. For example, Section 1, Fifth of the RLA[21] defines the term "employee" as including "every person in the service of a carrier (subject to *its* continuing authority to supervise and direct the manner of rendition of his service)" (emphasis supplied). Several other sections refer to the carrier(s) and "*its* or

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[17] 29 U.S.C. § 52.

[18] 254 U.S. 443 (1921).

[19] 44 Stat. 577.

[20] It was amended in 1936 to include the airline industry. *See* 45 U.S.C. §§ 181-185.

[21] 45 U.S.C. § 151, Fifth.

their employees." [22] The use of the defined term "employee" throughout the statute strongly suggests that a classical employee-employer relationship was contemplated by Congress.[23]

In our search of the legislative history of the original RLA and its subsequent amendments,[24] we have been unable to find any expressed or implied indication that Congress intended to prohibit the use of secondary activities by a labor organization once the procedures established by the RLA had been exhausted between the union and the carrier with whom negotiations were taking place. It [sic] the face of this legislative silence, the conclusion that Congress meant to proscribe such activities can only be reached by surmise and speculation.

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[22] Emphasis supplied. *E.g., Section* 2 (45 U.S.C. § 152) (General duties of carriers and employees to settle disputes), Section 7 (45 U.S.C. § 157) (Arbitration), and Section 10 (45 U.S.C. § 160) (Emergency Board).

[23] *E.g.*, Section 3 (45 U.S.C. § 153) (National Railroad Adjustment Board, referred to in the original act as "Boards of Adjustment"), Section 5 (45 U.S.C. § 155) (Mediation Board, Section 4 of original act), and Section 6 (45 U.S.C. § 156) (procedure in changing rates of pay, rules and working conditions). We note in passing that when the RLA was amended in 1936 to include carriers by air, 49 Stat. 1189, similar language was adopted by Congress, *e.g.*, Section 201 ("air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."). 45 U.S.C. § 181. Emphasis supplied. *See also* Sections 204 (45 U.S.C. § 184) and 205 (45 U.S.C. § 185).

[24] June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, 48 Stat. 1185; June 25, 1936, c. 806, 49 Stat. 1921; Aug. 13, 1940, c. 664, 54 Stat. 785, 786; June 25, 1948, c. 646, 62 Stat. 991; May 24, 1949, c. 139, 63 Stat. 107.

Appendix

The statements of Congressmen Merritt and Berkeley,[25] relied upon by appellants are at best ambiguous, as is that of D.B. Robertson, President of the Brotherhood of Locomotive Firemen & Enginemen.[26] The language referred to by appellants, presently contained in 45 U.S.C. § 151a(1), to the effect that the RLA prescribes procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules or working conditions," [27] was not in the RLA as enacted in 1926. *See* 44 Stat. 577. In any event, even as it reads today, we must take this language in the light of the definition of the term "employee" previously indicated. That definition establishes that the RLA seeks to regulate *only* the relationships and disputes arising between carriers and those persons "subject to the continuing authority [of the carrier] to supervise and direct the manner of rendition of his services," [28] *e.g.*, persons in an employer-employee relationship.

Appellants' best argument would have been that the Supreme Court's decision in *Duplex Printing* survived the RLA's passage in 1926, thus making it illegal to have a secondary boycott even after its enactment. It is apparent why appellants have not pressed this point, however.

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[25] 67 Cong. Rec. 4568; 4519 (1926). "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week . . . national calamity [would result]." (Congressman Merritt, 67 Cong. Rec. 4568 (1926)).

[26] The RLA "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180*, 69th Cong., 1st Sess. 191 (1926).

[27] Emphasis supplied by appellants in their brief.

[28] 45 U.S.C. § 151, Fifth.

In 1932, Congress enacted the Norris-LaGuardia Act.[29] Section 1 thereof unequivocably states:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[30]

Section 2 proceeds to state that in the interpretation of this statute and "in determining the jurisdiction and authority of the courts of the United States . . . [it is] the public policy of the United States . . . that [employees] shall be free from the interference, restraint, or coercion of employees of labor . . . in [the effectuation of] concerted activities for the purpose of collective bargaining or other mutual aid or protection.[31] In labor parlance, "concerted activities," of course, includes strikes and secondary boycotts. *See Jacksonville Bulk Terminals, Inc., supra.*

The Norris-LaGuardia Act is anything but vague regarding acts that are *not* subject to the equitable jurisdiction of the courts of the United States. Section 4 specifically deprives federal courts of power to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit the following acts:

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[29] 47 Stat. 70, 29 U.S.C. §§ 101-115.

[30] 29 U.S.C. § 101.

[31] 29 U.S.C. § 102.

> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
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> . . .
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> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.[32]

This is exactly the conduct that appellants seeks to enjoin.

It is Section 13, however, which is most damaging to appellants' contentions. It defines the term "labor dispute" as including:

> *any controversy* concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*[33]

This provision was specifically enacted to overrule the Supreme Court's decision in *Duplex Printing. See H.R. Rep. No. 669,* 72d Cong., 1st Sess. 10 (1932); *Meat Cutters Union* v. *Jewel Tea Co.,* 381 U.S. 676, 703 (1965) (Goldberg, J., concurring); *United States* v. *Hutcheson,* 312 U.S. 219, 229-30 (1941); Cox, Bok & Gorman, *Labor Law, supra,* at 55-60. Furthermore, it was intended by Congress that the provision be broadly interpreted. *See Corporate Printing Co., Inc.* v. *New York Typographical Union No. 6,* 555 F.2d 18 (2d Cir. 1977). It has thus

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[32] 29 U.S.C. § 104(e), (i).

[33] 29 U.S.C. § 113(c). Emphasis supplied.

been regarded as a limitation against enjoining even controversies whose genesis is political protest, *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n,* 457 U.S. 702 (1982) (refusal to handle ships of the U.S.S.R. in protest of invasion of Afghanistan), and to cover intraunion disputes. *See Bodecker* v. *Local Union No. P-46,* 640 F.2d 182 (6th Cir. 1983).

More on point, however, it is unquestioned that since its enactment, this section, together with the specific language of other conditions previously pointed out, deprived federal courts of *any* jurisdiction to enjoin secondary boycotts. *See Iron Workers* v. *Pauly Jail Bldg. Co.,* 118 F.2d 615, 620 (8th Cir.), *cert. denied,* 314 U.S. 639 (1941); *Wilson & Co.* v. *Birl,* 105 F.2d 948, 952 (3d Cir. 1939); *Cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U.S. 437 (1948) (where the picketing is not related to a labor dispute the activity may be enjoined). Although the decided cases on the issue of secondary boycotts do not include any carriers or labor organizations covered by the RLA, the language of these decisions places great reliance on the all inclusive language of the Norris-LaGuardia Act prohibition. This reliance is particularly relevant when we consider that the statute was enacted to deal with a specific issue, to control the issuance of injunctions by federal courts in cases of labor disputes, rather than the broader purposes of a general labor law such as the RLA.

Appellants again look to the legislative history of the Norris-LaGuardia Act for support for their contention that secondary boycotts in the railway industry were excluded from its coverage. Congressman Beck proposed an amendment which would have excluded labor disputes in the railroad industry from the proscription of Section 4 of the

[sic—probably should be Norris-LaGuardia Act].[34] In opposition, Congressman LaGuardia stated that this amendment was unnecessary because the RLA "provided a machinery . . . for settling labor disputes." [35] The amendment was then defeated. We cannot agree that this incidental exchange is sufficient to defeat the specific and encompassing exclusion of the Norris-LaGuardia Act. The exchange means only that the RLA establishes the procedures which must be followed prior to any strike activity taking place. Once they are exhausted, however, both parties, may resort to self-help, as they have done in this case. However, if they engage in self-help activities before exhaustion of the machinery established for dispute resolution, the action may be enjoined notwithstanding the Norris-LaGuardia Act. It is only because there is such machinery that the Supreme Court has carved out exceptions to the statute. *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957) ("minor" disputes to be submitted to Adjustment Board for compulsory arbitration); *Shore Line R. Co.* v. *Transportation Union*, 396 U.S. 142 (1969) ("major" disputes). *Cf. Boys' Market, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (injunction available to enforce contractual no strike clause if the grievance subject to arbitration). In this case, however, the parties have exhausted the pre-self-help dispute resolution procedures. They are thus free to engage in peaceful conduct to seek improvement of their respective positions.

Congress has not been reticent to prohibit secondary boycotts and to provide injunctive relief against them when it has considered it advisable.

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[34] 75 Cong. Rec. 5503 (Mar. 8, 1932).

[35] *Id.* at 5499.

In 1935 it enacted the National Labor Relations Act (Wagner Act), 49 Stat. 449, whereby the organizational rights of employees were generally recognized throughout the industrial and business sectors of the United States. The statute provided for unfair labor practices by employers, but contained no such prohibitions against labor organizations. Furthermore, the Act did not restrict secondary boycotts or picketing. *See Allen Brudely Co.* v. *Local 3, IBEW*, 325 F.2d 503 (2d Cir. 1942). It was not until the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 140, that Congress mentioned, and thereafter prohibited, secondary boycotts. *See* 29 U.S.C. 158(b)(4).[36] *See generally* Millis & Brown, *From the Wagner Act to Taft Hartley* (1950); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1 (1947). When Congress perceived various loop holes in that statute it proceeded to enact the Landum-Griffin [sic] Act in 1959, 73 Stat. 525, 542, 545, and thus prohibited "hot cargo" clauses and similar conduct. 29 U.S.C. § 158(e).

It is significant not only that Congress has known how to specifically enact prohibitions against secondary activity, but also that Congress has not left to private enforcement the enjoining of secondary conduct. Such powers, when permitted, have *only* been granted to a designated federal agency, the National Labor Relations Board. *See* 29 U.S.C. § 160.

From all of the above we conclude that there are indeed some areas in the field of railroad labor relations that have

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[36] Interestingly enough, during the debates for the enactment of the Taft-Hartley Act, Senator Taft was of the view that secondary boycotts by railroad employees were protected by the RLA. 93 Cong. Rec. 6498, 2 Legislative History of the Labor were Management Relations Act, 1947, p. 1571.

been left unregulated. Whether this state of affairs should be allowed to remain is an affair of state, not a matter for the courts to correct. By now there should be no question that courts are not constitutionally empowered to enact legislation.

We should keep in mind that the Supreme Court stated in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1968), a case in which the issues were closely related to the matters before us:

> No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions or social and economic policy. And the common law of labor relation has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting that those separating primary from "secondary" activities.

Citations omitted.

Appellant should seek relief not before this Court, but before Congress.

III

Lastly, appellants argue that the Norris-LaGuardia Act must be read in context with the Interstate Commerce Act, 49 U.S.C. § 11101 *et seq.*, which establishes a national policy in favor of providing uninterrupted rail transportation. This policy, appellants claim, as expressed in 49 U.S.C. §§ 11101(a) ("A common carrier . . . shall provide the transportation or service on reasonable request") and 10741 (prohibitions against discrimination by common carrier), permits the issuance of an injunction to prevent

secondary picketing. To say the least, this argument is far-fetched.

It is clear from reading the Interstate Commerce Act, that it is principally a *carrier*-regulatory statute. *See* 49 U.S.C. §§ 10101, 10101a. It is not a labor law, nor is it intended to control in any manner the conduct which is permissible in a labor dispute. Although a common carrier cannot under the statute refuse to handle cargo or provide transportation to passengers for discriminatory reasons,[37] there is nothing in the statute that imposes obligations on the carrier, if prevented by any *force majeure* from meeting its statutory duties. Picketing of the nature here in question may well be *force majeure*.[38] If appellants are entitled to injunctive relief against secondary picketing because it interferes with a carrier's duties under the Interstate Commerce Act, they are equally entitled to such relief against primary picketing, which is just as disruptive of interstate commerce. Obviously, such an argument cannot be seriously made.

We thus agree with our brethern [sic] of the Seventh Circuit that the Interstate Commerce Act does not provide leave to ignore the proscriptions of the Norris-LaGuardia Act. *Burlington Northern R. Co., supra,* 793 F.2d at 800. *See also Order of Railroad Telegraphics* v. *Chicago & N.W. Ry.,* 362 U.S. 330, 339 (1960); *Milk Wagon Drivers' Union* v. *Lake Valley Co.,* 311 U.S. 91, 103 (1940).

The order of the district court denying injunctive relief is *affirmed.*

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[37] Just as it could not at common law. *See American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Railway Co.,* 387 U.S. 397, 406 (1967).

[38] *See Mishara Constr. Co.* v. *Transit-Mixed Concrete Corp.,* 310 N.E. 2d 363 (Mass. 1974) (recognizing that when labor dispute is unexpected and occurrence of the dispute presents unusual difficulty "the excuse of impracticability may well be applicable").